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SUPREME COURT OF THE UNITED STATES

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NUMBER 648

HOWARD BRANKLIN CHAPMAN
Petitioner

vs.

UNITED STATES OF AMERICA

On writ of certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF PETITIONER

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REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the fifth Circuit in this case is officially reported in Federal Reporters Second Series.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 USCA 1254 (1), and under and by virtue of title 18 USC 3772 and within the time provided for under rule XI of the Rules of Practice Procedure promulgated May 7, 1934, 292 U. S. 661, 666, 54 S.C.T. XXXIX) in Rule 22 (2) of the Supreme Court rules.

Jurisdiction of this court is invoked because the United States Court of Appeals for the Fifth Circuit has decided an important question of Federal Law, which is not, but should be, settled by this court and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctions such a departure by a Lower court, as to call for an exercise of this court's power of supervision and has misconstrued a decision of this Court involving the construction of a statued of the United States, and has, by it's ruling, rendered the plea of entrapment a jury question beyond the control of the court so as to allow a man aquitted on one (1) count to be convicted of a count alleging an almost identical transaction between the same parties only a few days later, and has allowed the trial court to use in evidence a recording of a conversation made by a concealed miniature minafor recorder on the person of a Federal agent without the knowledge or consent of the defendant and without identification of the participants in the conversation and with a portion of the conversation taking place outside of the presence of the defendant and with portions of the conversation being inaudiable when amplified in the presence of the jury, and has allowed a conviction to stand where the United

States Attorney in open Court stated to the Court that on the evidence admitted and the law given in charge the defendant should be aquitted.

The judgment of the Court of Appeals was entered on the 10 day of November, 1959. A petition for rehearing was denied on the 17 day of December, 1959. The petition for certiorari was filed and docketed in the Supreme Court of the United States on the 15 day of January, 1960, within thirty (30) days after an order extending the time for filing signed by Honorable Hugo L. Black, Associate Justice of the United States Supreme Court entered on the 15 day of December, 1960. The order extending the time for filing said petition for certiorari having been entered within thirty (30) days after the date of the final judgment of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing.

STATUTES INVOLVED

SECTION 5686, title 26, USCA.

THE QUESTIONS PRESENTED

The United States Court of Appeals for the fifth Circuit erred in deciding that the defense of entrapment is entirely a jury question on an indictment for possession of property intended for use in violating the Internal Revenue Laws relating to non-tax paid distilled spirits, in violation of section 5686, title 26 USCA where the indictment contained two (2) counts. One alleging a transaction and possession on the 21st day of November, 1957, and the second on the 26th day of November, 1957, and where the Internal Revenue Offices were the initiating principals in each transaction without any evidences of previous transactions by the accused and where the jury found the accused not guilty on count one (1) alleging possession on the 21st day of November, 1957.

The Court of Appeals erred in finding the trial court properly admitted into evidence and allowed by amplification to be played in the presence of the jury a tape recording, between the undercover agents and the accused on each transaction, made by use of a miniature minafor recorder carried in the pocket of one of the agents, a part of which recording was inaudible and a part of which contained conversations between the agents out of the presence of the accused. The Court instructed the jury prior to it's playing "... give it just such weight and credit that you think it's entitled to receive," and after the playing "... I instruct you to be very cautious to observe that testimony (conversation between the officers themselves) and do not consider any conversation that took place between the officers not in the hearing or presence of the defendant...."

The Court of Appeals erred in failing to reverse the

conviction of the defendant on count two (2) of the indictment and instructing the trial Court to enter a judgment of acquittal not withstanding the verdict on the motion by defendant's counsel on the basis of the statement by the Assistant United States Attorney prosecuting in open Court, that the jury would not be authorized to convict the defendant on either count on the evidence submitted and the court's charge as to the Law.

STATEMENT OF THE CASE

The petitioner was indicted on two (2) counts charging possession of property intended for use and violating the United States Internal Revenue Laws relating to non tax paid distilled spirits, in violation of section 5686 Title 26 USCA. He was convicted on the second count and sentenced to one (1) year probation from which judgment he appeals.

The government's evidence indicated that on October 23, 1957, an investigator Weems telephoned Chapman's Bakery and spoke to the petitioner who was the proprietor. At that time the sale of sugar by petitioner to the investigator was discussed and the security necessary. The following day the investigator visited petitioner at the Bakery and further discussed the sugar. On the 7th day of November the investigator together with an investigator Denny again went to the Bakery and petitioner stated that he had been sick and that they should call him the following Monday. Two weeks later the officers returned and made a purchase of sugar. Thereafter on the 26th day of November, investigators Weems again telephoned petitioner asking to purchase additional sugar. That evening at approximately 8:00 o'clock P. M. the agents went to petitioner's residence and purchased a portion of a load of sugar parked at the curb in front of petitioner's house. Thereafter and prior to leaving the scene an arrest was made by other alcohol and tobacco tax agents.

On departing for jail with the officers petitioner told them that he was selling the sugar to recover from business losses that he had sustained. Thereafter petitioner

admitted to the supervisor in charge of the alcohol and tobacco tax division that he was reasonably certain that the material was to be used in making moonshine whiskey.

Petitioner denied a large portion of the conversation about whiskey but admitted that after the first transaction investigator Weems talked about being a Boot legger as did the other investigator. He also stated that he told them "if you're going to make liquor out of it, you better pay a tax on it, I suppose."

The rebuttal for the government consisted of the recording made by the officers on a pocket size minafor wire recorder at the time of the transactions.

The petitioner was convicted on count two (2) and acquitted on count one (1). At the conclusion of the government's evidence a motion for a directed verdict of acquital was made on behalf of petitioner. Also after the judgment of guilty on count two (2) and not guilty of count one (1) a motion for judgment of acquital not withstanding the verdict was made as to count two (2).

The plea of entrapment was insisted on through out the trial by petitioner.

SUMMARY OF ARGUMENT

1.

The petitioner under a general plea of not guilty raised the defense of entrapment. The jury after receiving a recharge at their request on the law of entrapment found the defendant not guilty on count one (1) and guilty on count two (2) which occured some five (5) days later. An examination of the record reveals that the jury sustained the plea of entrapment as to the first count and the law of the case this being established it is obvious that as a matter of law the plea of entrapment was sustained as to count two (2).

2.

The use of a tape recorder by the officers in the instant case without the knowledge of the defendant permitted them to unlawfully invade his property and guide the conversation so that he would make admissions or statements that they could make into admission and even gave them the privilege of editoralizing out of his presence in order to take the words he spoke and make of them a snare with the view in mind of using them against him in court in the event a criminal case was made. Evidence of this sort is not only a potent invasion of privacy but is also a violation of the rules of fair play and in the fariest method of obtaining confession without informing the defendant of his constitutional rights.

3.

When in the course of judicial proceeding the United States Attorney states as follows, "your Honor if that

is the law of this court the evidence is clear that they didn't have such intent and we believe that in that event the court should grant a judgment of "acquital" such is a judicial admission and would demand a finding of not guilty.

ARGUMENT

Part I

ENTRAPMENT

This court in the case of *C. V. SORRELLS vs. UNITED STATES OF AMERICA*, 287 US 435, 77 L ed 413 (1932) held that the question of entrapment is properly raised on a plea of not guilty. The court defined the plea of entrapment and quoted the statement of Circuit Judge Sanborn in the case of *Butts vs. United States*, 273 Fed. 35 as follows: "the first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite and to create crime for the sole purpose of prosecuting and punishing it."

The case of *Joseph George Sherman vs. United States of America* 356 US 369, 2nd Led. 2D 848 (1958) this court recognized and defined the law of entrapment and held that under the facts in that case the defense of entrapment was established as a matter of law.

In the instant case the petitioner engaged in one transaction and five days thereafter engaged in another transaction each involving the sale of sugar and yeast to government agents. As to the first transaction, the plea of entrapment was sustained by the jury and the petitioner acquitted. As to the second transaction, the petitioner was found guilty by the jury.

At no time did the petitioner seek out the officers but on each occasion he was sought out. Once having made a sale he found himself in a position where few

would decline to do business further and they with only grave misgivings.

The government agents having set the trap and lured the petitioner into it set it again and lured him in once more. The grave question in the mind of the jurors is born out by the fact that they ask a recharge on this subject.

Between the first transaction and the second, not one shred of evidence exists that moved the petitioner into the position of the procuring agency for the other transaction. His innocence having been established by the jury as to the first transaction it follows as a matter of law that the second transaction was that of the officers and not that of the defendant.

Part II

INADMISSIBILITY OF EVIDENCE

Admisibility of a pocket tape recorder carried by the officers for evidentiary purposes in evidence when a portion of the recording was made after the presence of the accused.

The use of a concealed recording devise in the instant case went much further than the use of a pocket radio in the case of *Lee vs United States of America*, 343 US 747, 96 Led 1270 (1951), where such was held to be competent evidence. In the instant case two well trained officers knowing of the presence of the recorder carefully guided the conversation so as to induce admissions for possible use in Court without the petitioner being advised as to his rights or having any knowledge of the existence of the recorder. They even conversed out of his presence knowing that such could not be used as evidence in any court. The quality of the recording was such that even with amplification it was inaudiable at points. It's quality was such that the two records in which it was used on two of the defendant's separate trials differ at points.

Petitioner strongly feels that both the fourth and fifth amendments to the Constitution of the United States are violently torn by this type of evidence. Aside from the questions of constitutional privilege this recording is not a chance recording by children playing games but is a deliberate premediated act by two skilled and highly trained officers.

Petitioner concedes that a criminal prosecution is more than a game but feels that the evidence complained of should be excluded as a question of sound policy in the administration of the law.

Part III

MOTION FOR JUDGMENT OF ACQUITTAL

On the United States Attorney's statement that the court on the basis that the evidence and it's charge should direct a verdict of acquittal.

A retraxit is "an oral renunciation by plaintiff in open court of his suit or cause of action. It differs from a dismissal or nonsuit in that in the latter the plaintiff may generally begin his suit again, whereas by entering a retraxit the plaintiff forever looses his cause of action." 17 Am Jur 101. Black's Law dictionary citing three Blackstone Commenteries 296 defines it as an open renunciation by a plaintiff of his suit in court, made when the trial is called on, by which he forever looses his action, or is bared from commencing another action for the same cause.

In criminal law usually the term "nolle prosequi" is used. This is voluntary withdrawal by the prosecuting authority of present proceeding under a particular bill. 14 Am Jur 965.

In the instant case the United States Attorney's statement was made in open court prior to verdict. Such was a renunication of the cause and of the case and a judgment of acquittal or a dismissal should have been entered.

CONCLUSION

Petitioner having been acquitted on count one (1) and evidence indicating that the United States agents were the moving factors as to the second transaction the court erred in not directing a judgment of acquittal. The manner of preparation in use of the tape recorder by skilled officers was at best inconsistent with fair play. The United States Attorney's statement that on the evidence and the charge (which the court of Appeals referred to as a fair charge) the defendant should be acquitted was a renunciation of his cause which should have been honored.

The trial court erred in refusing to grant a judgment of acquittal and the United States Court of Appeals erred in affirming the trial court on these rulings. The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and the trial court ordered to enter a judgment of acquittal.

Respectfully submitted,

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February, 1960